first plaintiff was a bookseller, which he still is, who also sells papers and magazines, some of which have to be delivered. At the time of the accident he was earning about $300 a month. He says in evidence that as a result of the accident because he has difficulty in squatting he has to employ an assistant in his bookshop whom he pays about $120 per month but he did not produce this assistant or books to prove this, and I therefore discount what he says.

Mr. Tay for the first plaintiff submits that his client should get general damages as follows:

(1) $2,500 for the fracture of the clavicle;
(2) $16,000 for the fracture of the femur resulting in pain and suffering and a shortening of the leg by 1¼" and loss of amenities, but exclusive of loss of future earnings; and
(3) about $20,000 for loss of earnings.

Mr. Marjoribanks concedes that —

(1) $2,500 would be fair damages for the fracture of the clavicle, but contends that —
(2) only a figure between $3,000 and $8,500 would be fair for the fracture of the femur, relying on cases noted in paragraphs 3803, 3823 and 3825 in *Mallal's* Digest; and
(3) the first plaintiff should get nothing for loss of earnings because the first plaintiff has not in his statement of claim mentioned the necessity for hiring of servants under special damages and has not claimed loss of earnings and that in any event he has not proved the same.

I have examined all the cases cited and award the first plaintiff —

(1) $2,500 for the fracture of the clavicle;
(2) $10,000 for the fracture of the femur resulting in pain and suffering, shortening of the leg and loss of amenities.

As regards loss of earnings, I do not consider that the first plaintiff has proved the same and I therefore award nothing under this head.

I also award the first plaintiff $300 agreed special damages.

The above figures are based on the assumption that the lorry driver was wholly to blame for the accident. But as I find that he was only 2/3 to blame, I order in Civil Suit No. 26 of 1968 the first defendant to pay the first plaintiff the above sums in full, with interest on general damages at the rate of 6% from the date of issue of writ until judgment and on special damages at the rate of 3% from the date of the accident until judgment, and I also order the first defendant to pay costs to the first plaintiff, and finally I order that the first defendant shall be entitled to a contribution by the third party (the second plaintiff) to the extent of 1/3.

As to the deceased, I find that he was a tailor earning about $200 a month. He was 27 years old and a bachelor. He lived at home with his parents and four other brothers and sisters. He gave his parents $100 a month, out of which they fed him on Sundays and public holidays, as on working days he was fed by his towkay in the shop. His mother died in 1968 and Mr. Onn, counsel for the second plaintiff, said that he made no claim in respect of her. Mr. Onn submits on the authority of the case noted in paragraph 3567 of *Mallal's* Digest that the multiplier here should be more than 11, as a tailor's occupation is not dangerous and his expectation of life should be 28 years and that his father might have been supported by his son for seven years, *i.e.*, until the age of 65 and that the value of the dependency should be determined at $50 per month and that in view of all this the second plaintiff should be awarded $4,200 general damages. Mr. Marjoribanks on the other hand submits that the multiplier should be not seven, but five and that on the authority of the case noted in paragraph 3645 of *Mallal's* Digest the second plaintiff merits only $3,000 and no more. Having given this matter the best consideration, I award the second plaintiff $3,500 general damages and $1,000 agreed special damages. As I find that the deceased was 1/3 to blame for the accident, in Civil Suit No. 37 of 1968 I order the defendants to pay the second plaintiff 2/3 of each of these figures with interest on the first sum at 6% from date of issue of writ until judgment and on the second sum at 3% from the date of the accident until the date of judgment. The defendants will also pay the second plaintiff's costs.

Judgments for the first and second plaintiffs respectively.

Solicitors: *Murphy & Dunbar; Lovelace & Hastings; Kam Woon Wah & Co.*

NASIB SINGH v. JAMILAH

[F.C. (Ong C.J. (Malaya), Gill and Ali F.JJ.) March 23, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 112 of 1971]

Moneylenders — Accounts — Statement of — Onus to discredit — Intrinsic evidence of false entries — Disregard of date of payment of interests — Moneylenders Ordinance, 1951, s. 18.

Evidence — Inspection of moneylender's account by a debtor — Third party's account — Admissibility of — Corroboration purposes — Evidence Ordinance, 1950, ss. 11, 15 and 16.

This was an appeal against the decision of the High Court, setting aside the judgment of the sessions court, in a claim for a moneylending transaction.

On August 4, 1965, the respondent gave the appellant, a moneylender, her promissory note for $1,500, bearing interest at 18% *per annum*. The appellant's claim was for the total sum of principal and interest due, less the sum of $697.50 repaid intermittently on 21 occasions towards interest.

The respondent's defence, *inter alia*, was that she was in fact given a sum of only $500 against delivery of her promissory note. She was charged interest at 10 *per cent* per month and had been paying $50 each month regularly from September 1965 till December 1967, after which she had made further monthly payments of $20 to $30 each time, amounting to $600 till December 1969. However, the appellant's accounts contradicted what the respondent said.

The moneylender appealed to the Federal Court on the sole ground that, in applying section 18 of the Moneylenders Ordinance, 1951, to the loan account of the borrower in this case, the learned judge erred in his interpretation of the said section since the trial court had found as a fact that the account in question was in order.

Held, dismissing the appeal: (1) the onus of discrediting the statement of account rests on the borrower. To succeed,

so as to render the moneylender's claim unenforceable by virtue of section 18(2) of the Moneylenders Ordinance, it had to be shown that entries of relevant transactions in the particular account are false. It is not sufficient merely to cast suspicion on it by reason of defaults or deficiencies detected in other accounts;

(2) the learned judge was in error in his interpretation of section 18 of the Moneylender's Ordinance and in holding that the irregularity shown in the accounts of the other debtors were sufficient for the purpose of impeaching the truth of the respondent's account appearing in the same book. Section 18(2) of the said Ordinance carefully preserves a distinction between the effect of non-compliance with sub-section (1) generally, and proof of non-compliance in particular cases. Non-compliance with the requirements of section 18(1) is a question of degree which may or may not be fatal to a claim by the moneylender. Each case must be considered in the light of its particular facts and circumstances;

(3) in the present case however, the book entries of the appellant's account books provided intrinsic evidence that the respondent's account contained false entries relating to the payment of interest. The accounts of other debtors provided corroborative evidence that for all payments of interest the true date of payment was disregarded when the entries were made. Such being the case, the appellant had clearly failed to comply with the provisions of section 18 of the Moneylenders Ordinance.

Semble: .... it is essential that all courts should be vigilant in exercising their discretion to see that the right of the debtor to pry into his creditors affairs is not abused in an oppressive manner. In all cases names of third parties should never be bandied about in open court and public disclosure made of the financial affairs of third parties.

Observation on the obligation of moneylenders to issue receipts, the relevancy of other accounts of third party debtors and on the award of costs in the circumstances of this case.

Case referred to:-

(1) *Boor Singh* v. *Abdul Majeed* [1967] 1 M.L.J. 16, 19.

FEDERAL COURT.

S. D. K. Peddie (*K. L. Devaser* and *Syed Hassan Aljeffri* with him) for the appellant.

V. K. Palasuntharam for the respondent.

Cur. Adv. Vult.

Ong C.J. (Malaya): Jamilah binti Abdul Hamid is a lady school teacher. On August 4, 1965 she gave to Nasib Singh, a moneylender, her promissory note for $1,500 bearing interest at 18 *per cent. per annum.* On February 5, 1971 the sessions court gave judgment against her for the sum of $2,025.75 with interest and costs. She appealed to the High Court which on October 4, 1971 set aside that judgment.

Nasib Singh now appeals to this court on the sole ground that, in applying section 18 of the Moneylenders Ordinance 1951 to the loan account of the borrower in this case, the learned judge erred in his interpretation of that section since the trial court had found as a fact that the account in question was in order.

The relevant provisions of section 18 read as follows:—

'18.(1) Every moneylender shall keep or cause to be kept a regular account of each loan... entered in a book paged and bound in such manner as not to facilitate the elimination of pages or the interpolation or substitution of pages.

(2) If any person subject to the obligations of this section fails to comply with any of the requirements thereof, he shall not be entitled to enforce any claim in respect of any transaction in relation to which default shall have been made. He shall also be guilty of an offence under this Ordinance and shall be liable to a fine not exceeding fifty dollars, or in the case of a continuing offence, to a fine not exceeding ten dollars for each day or part of a day during which such offence continues."

The appellant's claim was for the total sum of principal and interest due, less the sum of $697.50 repaid intermittently on 21 occasions towards interest. The respondent's defence — apart from raising certain technical objections which were foredoomed to failure — was that she was in fact given a sum of only $500 against delivery of her promissory note. She was charged interest at 10 *per cent* per month and had been paying $50 each month regularly from September 1965 till December 1967, after which she had made further monthly payments of $20 to $30 each time, amounting to $600 till December 1969. Her story was contradicted by the appellant's accounts, kept as prescribed by section 19 of the Ordinance, a copy of which was annexed to his statement of claim pursuant to the provisions of section 21. The onus of discrediting the statement of account consequently rested on the respondent.

At the trial of the action cross-examination of the appellant and his witness was concentrated wholly on the accounts of other debtors appearing in two books produced by the appellant in support of his claim. The resulting impression produced in the mind of the learned president was that —

"with regard to the entries relating to the other moneylending transactions it might be said that they had not been regularly or properly kept".

But, in his view, whatever the faults or deficiencies that might be seen in those accounts, they were —

"extraneous to the present case and should be reserved for future litigation".

So far as the respondent's particular account was concerned, counsel appearing for her had made no criticism. Hence it was perhaps not surprising that the president himself, without examining it, could see nothing wrong as showing non-compliance with the provisions of section 18. Sub-section (2), it will be observed, renders a claim unenforceable only if it can be shown that, in any transaction connected with such claim, there has been non-compliance with the provisions of the section.

The simple issue in this appeal, therefore, is whether the respondent's account as entered in the appellant's books was true or false. To succeed in attacking that account, so as to render the appellant's claim unenforceable by virtue of sub-section (2), it had to be shown that entries of relevant transactions in this very account were false. It was not sufficient merely to cast suspicion on it by reason of defaults or deficiencies detected in other accounts.

In taking a different view from that of the president, the learned judge was undoubtedly in full agreement with the *dicta* of MacIntyre J. (as he then was) in *Boor Singh* v. *Abdul Majeed*[1] where he quite rightly said: —

"To keep a regular account, in my opinion, would mean to keep an account book in which every entry is made as and when a transaction is completed and in chronological sequence

...."

On this point the judge commented as follows:—

"The word regular must, I think, be construed to mean orderly and systematically, as opposed to casually, spasmodically or intermittently (see *Saunders'*, Words and Phrases Legally Defined, 2nd Ed., Vol. 4, p. 286."

In conclusion the learned judge went on:—

"In my opinion the real issue is not whether the entries in P2 and P3 do or do not affect the accounts pertaining to *this* particular transaction, but whether, by reason of the irregularity of the accounts relating to the *other* transaction, the account book in which this particular transaction was entered can in the circumstances be said to be a book such as is required by the section. Indeed if the learned president had found that the entries relating to the other transactions tend to show that there was every opportunity to facilitate the elimination or interpolation or substitution of pages, then clearly the respondent had failed to enter the account relating to this particular transaction in a book paged and bound in such manner as not to facilitate the elimination of pages or the interpolation or substitution of pages. For this reason, I think the learned president erred in holding that the entries pertaining to the other transactions were only relevant in so far as they affected the probative value of the plaintiff's evidence. Furthermore he also erred in holding that such entries were extraneous in the present case and should be reserved for future litigation."

For the reasons abovestated the appeal was allowed and the judgment of the sessions court set aside. With respect I think the learned judge was in error in his interpretation of section 18. The appellant's books were paged and bound so as not to facilitate the elimination, interpolation or substitution of pages. The hypothetical question raised in the judgment of the High Court was not answered in the affirmative. The decision, therefore, turned on the fact that the irregularities shown in the accounts of other debtors were held sufficient for the purpose of impeaching the truth of the respondent's account appearing in the same books. In my opinion, if that is the statement of the law, it goes too far. If the learned judge was right, it means this: where any defendant debtor manages to satisfy the court that the accounts of other debtors were not regularly kept, or were otherwise not in order, then the book in which they appear should be held to have been not regularly kept as required by sub-section (1) of section 18 and the claim against such defendant becomes *ipso facto* unenforceable merely by reason of being in the same book. Pursuing this course of reasoning to its logical conclusion, it means that all debtors, whose loan accounts appear in any book which is successfully impugned, should escape liability. It certainly was never the intention of sub-section (2) that one swallow should make a summer — not even a flight of them. This sub-section, it must be observed, carefully preserves a distinction between the effect of non-compliance with sub-section (1) generally and proof of non-compliance in particular cases. For the former — which is declared an offence — a penalty is specifically provided. The invalidation of all claims on loans entered in the same book, therefore, necessarily increases the penalty for an offence to indefinite limits. In any particular case, however, where a claim is resisted, sub-section (2) provides in clear terms that the moneylender —

"shall not be entitled to enforce any claim in respect of any transaction in relation to which default shall have been made."

In other words, at least one entry in the account concerned must be successfully impugned as false or mistaken. Even so, I think that non-compliance with the requirements of sub-section (1) is a question of degree which may or may not be fatal to a claim by the moneylender. Each case must be considered in the light of its particular facts and circumstances. A single error, for instance, may have been a mistake made in all good faith, if a satisfactory explanation can be given.

I now turn to the respondent's account as entered in the appellant's books, wherein the president found, as he said, no flaw as regards compliance with the requirements of section 18. Payment of interest is, of course, a transaction relating to a debt sought to be enforced by action, within the provisions of sub-section (2). Hence any failure to keep a proper account of payments of interest on a loan must render the claim unenforceable. Entering payment on a date when no payment was in fact made is, in my opinion, as serious a non-compliance with the provisions of sub-section (1) of section 18 as the entry of a wrong or fictitious amount. Even a cursory inspection of the respondent's account on page 31 of Exhibit P2 and page 71 of Exhibit P3 reveals an extraordinary and incredible fact — that all of the 21 alleged payments of interest were entered as made punctually by the debtor on the due date, in fair weather or foul, over a period of more than 3 years. More incredible still is the fact that, according to the appellant's two books produced, every one of his scores of debtors was recorded as having made prompt payment of interest invariably on the due dates whenever interest was paid.

In his evidence the appellant said:

"It was agreed that defendant should pay interest every month — whenever she is free either on payday or one or two days thereafter".

On this point the respondent said:

"I get my pay monthly — on 28, 29 or 30 of the month. Plaintiff comes the day after my pay to collect the money".

Having thus contradicted the statement of account on the alleged dates, she went on to say:

"I was never issued with any receipts for payment of interest. I did not pay him as indicated on page 31 on P.2 I never paid him $22.50 at any time. I never paid him $67.50 at any time. I never paid him $90 at any time".

Upon this evidence the question naturally arises whether or not the appellant issued any receipts to the respondent as proof of payment. He said he did and produced a bundle of twelve receipt books containing duplicate carbon copies. Being illiterate, he was naturally unable to write out the receipts himself. So he had to employ an amanuensis "to write up" his accounts. That man was a petition writer, Inder Singh, who, he said, used to call 3 or 4 times a month and when he turned up the appellant would tell him to write out receipts for moneys received. The appellant kept no day book, but only P2 and P3. I now quote from the appellant's own evidence:—

"I will tell him from memory the loans I made and the moneys I received. My memory cannot fail me. When the receipts were written out I either post them or give them out by hand. I now say that I either post them or they come

and collect. When a debtor pays money he does not get a receipt straightaway".

There was, as to be expected, no proof of posting, nor corroboration from Inder Singh, who had to address the envelopes if receipts had to be sent by post. Had this or any other debtor demanded receipts, the appellant would have been obliged by sub-section (4) of section 19 to comply. This fact, I think, should be given the widest publicity, so that all debtors may know their rights and be better able to protect themselves against dishonest moneylenders failing to give credit for payments received.

The duplicate receipts were consequently of no value as evidence in the appellant's favour: rather the contrary, as revealed on examination. In all the 12 books I have looked over there was no chronological sequence. For instance, in Exhibit P5(6) a receipt dated January 21, 1966 was followed by Jamilah's of January 4, 1966; in Exhibit P5(8) receipts dated February 15, 1966, February 7, 1966, February 18, 1966 and February 21, 1966 were followed by Jamilah's of February 4, 1966; likewise for the months of March and April 1966; the same again in Exhibit P5(11) for July and August 1966. By what system of mnemonics could the appellant have been able to recall from memoyr assorted names and varying amounts of all moneys received between calls made by Inder Singh? And if his memory was so infallible, how could he have failed so often to remember payments by Jamilah until after receipts for later payments had already been written out?

The extent to which the appellant relied simply on his memory was revealed by Inder Singh who said:

"There would not be less than 30 — 40 borrowers who pay per month. The entries were made once in 10 days or bi-monthly or monthly. Since of late in 1970 he comes once in 10 days. Before 1970 he used to come once a month."

From this evidence I think it is nearer the truth to hold that the accounts were not written up oftener than once a month. Take, for instance, the accounts on pages 58, 59 and 60 of Exhibit P2. On page 58 the loan was given on January 20, 1966, on page 59 the loan was made on November 11, 1965 and on page 60 the date of the loan was December 6, 1965. Assuming that the book was properly used without skipping any pages, the only conclusion to be drawn from these entries is that, when the January loan was recorded, there were two loans already given out in November and December 1955 which had been left out for some reason or other best known to the appellant himself.

In short, enough has been said, in my opinion, to show that any inspection of the appellant's account books must lead to an inevitable conclusion. Counsel on his behalf concedes frankly, as they must in this case, that there is no gainsaying a legitimate inference. The book entries themselves provide intrinsic evidence that the respondent's account contained false entries relating to the payment of interest. The accounts of other debtors provide corroborative evidence that for all payments of interest the true date of payment was disregarded when the entries were made. Such being the case the appellant had clearly failed to comply with the provisions of section 18 and this appeal must be dismissed.

In this connection a ruling has been sought from this court as to the relevancy of other accounts, on which point the sessions court and High Court have expressed conflicting views. On behalf of moneylenders generally it is urged upon us that the accounts of other debtors not before the court are inadmissible and that pre-trial inspection of a moneylender's account book is an invasion of privacy. My own views may be summed up in a few words. As to inspection, a moneylender is entitled to refuse disclosure of the names and accounts of third party debtors. The debtor's rights to information and copies of relevant documents are set out in section 19 of the Ordinance and an inspection of the original books, if required, should be limited to the debtor's own account. This, however, does not imply that, when any books and documents have been produced in evidence, the books must be so covered up as to exclude examination of all other accounts. They may afford valuable corroborative evidence, as in this case, which is admissible under sections 11, 15 and 16 of the Evidence Ordinance. The true test, in any event, is relevance — that is to say, when something is revealed in the defendant debtor's account itself, which makes it necessary, in the interests of justice, to find out whether the other accounts bear out the contention of the debtor or the explanation of the moneylender, then, in my opinion, inspection of and cross-examination on such others, is desirable and justified. But not otherwise — and it is essential that all courts should be vigilant in exercising their discretion to see that the right of the debtor to pry into his creditor's affairs is not abused in an oppressive manner. In all cases names of third parties should never be bandied about in open court and public disclosure made of the financial affairs of third parties.

As to costs, a few words by way of explanation seems called for. The respondent should have succeeded at first instance in the sessions court. She accordingly must be awarded the costs of the action. She succeeded in her appeal before the High Court. The decision, though for wrong reasons, was correct. She was compelled by an adverse judgment to appeal and therefore should be entitled to her costs there also. The further appeal by the appellant to this court fails — but not on any ground advanced by the respondent. Had counsel representing her examined her account, instead of dissipating his energies elsewhere, this appeal would never have arisen. But what if she had not contested this appeal? Would she not be at risk of having the decision of the High Court reversed and suffering such reversal by her own default? She must therefore be held entitled to retain counsel and to her costs. In the circumstances, however, I would award only nominal costs, say, in the sum of $50.

Gill and **Ali FJJ.** concurred.

Appeal dismissed.

Solicitors: *Aljeffri & Co.; V. K. Palasuntharam.*